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Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

BARBARA C. FINE AND NANTUCKET EXPRESS LINES, INC.,
Petitioners,
v.
WOODS HOLE, MARTHA'S VINEYARD & NANTUCKET STEAMSHIP AUTHORITY, MASSACHUSETTS BAY TRANSPORTATION AUTHORITY AND JOHN J. McCARTHY, AS HE IS COMMISSIONER OF ADMINISTRATION OF THE COMMONWEALTH OF MASSACHUSETTS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts by rescript dated 1 April, 1966, in the case there entitled *Barbara C. Fine and Nantucket Express Lines, Inc.*, v. *Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, Massachusetts Bay Transportation Authority and John J. McCarthy as he is*

Commissioner of Administration of the Commonwealth of Massachusetts.

Opinion Below.

An opinion was filed by the Supreme Judicial Court of Massachusetts on 1 April, 1966. It is reported in 1966 Massachusetts Advance Sheets, p. 629. It is printed in the Appendix, p. 9, *infra*. It affirmed a decree of the Superior Court denying the entry of a declaratory decree upon decision without findings, and dismissing the bill under Mass. G.L. c. 231A, § 3, without cost to any of the parties.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

The writ is sought—

1. To review the final decree of the highest court of the Commonwealth of Massachusetts, dated April 1, 1966, affirming dismissal of the substitute bill on grounds merely of appellants' standing to challenge the application of a state statute on federal constitutional grounds. *Allied Stores of Ohio, Inc.*, v. *Bowers*, 358 U.S. 522, 525.

2. To test, by review, the Steamship Authority's interpretation and application of Mass. St. 1960, c. 701, § 5, on grounds that, in the absence of standards, it denies equal protection of the law and is repugnant to the federal law.

3. To test, by review, the power of a state agent to grant or deny a license in the absence of any standard, expressed or adopted by implication, on grounds that the power denies equal protection of the law and is repugnant to federal law. *Lerner* v. *Casey*, 357 U.S. 468, 473.

4. Did denial of section 5, c. 701, St. 1960, to give an aggrieved person a remedy of appeal and denial of any

standard under section 5 deprive petitioners of property rights without due process of law in contravention of the Fifth Amendment of the United States Constitution; and also create a monopoly in violation of the Sherman and Clayton Anti-Trust Acts, 15 U.S.C. § 1, *et seq.*?

Questions Presented.

1. Did refusal of the state court to enter a declaratory decree as to the validity of the application and interpretation of section 5 of the statute, when confronted with evidence uncontradicted and assented to by all parties (R. 40) supporting petitioner Nantucket Express Lines, Inc.'s engagement in interstate commerce violate article I, § 8, cl. 3, of the United States Constitution?

2. Did refusal of the state court to admit standing and to enter a declaratory decree, when confronted with evidence, uncontradicted and assented to by all parties (R. 40), supporting petitioner Nantucket Express Lines, Inc.'s being discriminated against by assessment of a license fee under section 5 of said statute, distended to become a tax (excise tax), violate article I, § 8, cl. 1, of the United States Constitution?

3. Did refusal of the state court to pass upon the interpretation and application by the Steamship Authority of its power under said section 5, in light of the federal question properly presented, violate the federal law?

Constitutional Provisions Involved.

The United States Constitutional provisions involved are:

1. Amendment XIV, sec. 1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

2. Article I, § 8, cl. 3: "The Congress shall have Power . . . To regulate Commerce . . ."

3. Article I, § 8, cl. 1: ". . . all Duties, Imposts and Excises shall be uniform throughout the United States . . ."

4. Amendment V: "No person shall . . . be deprived of . . . property without due process of law. . . ."

Statement of the Case.

In so far as the appeal here is confined to the questions presented, reference to petitioner Fine and respondents Massachusetts Bay Transportation Authority and John J. McCarthy as he is Commissioner of Administration of the Commonwealth of Massachusetts will be omitted.

Petitioner Nantucket Express Lines, Inc. (hereinafter referred to as "Lines, Inc."), is a private enterprise. It is engaged in the transportation of passengers by water on the high seas between Hyannis, Township of Barnstable (Cape Cod), Massachusetts, and the islands of Martha's Vineyard and Nantucket. A part of its operation is interstate (Decision of the Trial Court, R. 40; Offer of Proof, R. 23, 24, par. 9). Lines, Inc.'s operation includes the operation of the M.V. Martha's Vineyard, a vessel admeasured in excess of 100 tons.

Respondent Woods Hole, Martha's Vineyard and Nantucket Steamship Authority (hereinafter referred to as "Authority") is a public agent, created by special statute to render adequate transportation of passengers and commodities between Woods Hole, Township of Falmouth (Cape Cod), Massachusetts, and the islands of Nantucket and Martha's Vineyard (Mass. St. 1960, c. 701).

Mass. St. 1960, c. 701, § 5, provides a power to license: ". . . Except as provided in this act no person shall operate a vessel of more than one hundred gross tons for the

carriage of passengers, vehicles or freight for hire by water between the mainland of the commonwealth and the island of Martha's Vineyard or the island of Nantucket or between said islands unless licensed or permitted in writing so to do by the Authority. The superior court shall have jurisdiction, on a petition in equity by the Authority, to enjoin any such operation."

Under date of 15 June, 1963, by agreement with Lines, Inc., Authority issued a three-year license to Lines, Inc., under said section 5 which provided payment of a fee to the Authority by Lines, Inc. of 7½ per cent of the annual gross income received by Lines, Inc. from the operation of the M.V. Martha's Vineyard, with no adjustment of the amount received from interstate passengers.

The lower court found that Lines, Inc. was required to pay in excess of $10,000 per year (R. 40), part of which fee was based upon income received from transportation of passengers on trips in interstate commerce.

Lines, Inc. petitioned for declaratory relief on grounds that Authority's interpretation of its power to license and the determined license fee violated rights under interstate commerce; that the fee had been distended to a tax and was unauthorized by law; and that the power to license, in the absence of any expressed and determined standards under which the power is to operate and any right of review of a party aggrieved, is not constitutional.

Reasons for Granting the Writ.

But for the limitation under Mass. St. 1960, c. 701, § 5, Lines, Inc. would have the right to operate on the high seas. *The Laundry License Case,* 22 Fed. 701, 703.

The limitation designates no basis upon which a license is to be given and provides no right to a hearing before an

impartial body, nor any right of appeal to the courts. Thus Lines, Inc. has been deprived of due process and the limitation has been used to restrict competition, to the peril of the petitioner.

A monopoly has been created in violation of the Sherman and Clayton Anti-Trust Acts.

The court erred in stating that "Lines, Inc. shows and offers to show . . . Authority . . . may compete with it." There was no evidence offered that Lines, Inc. is apprehensive of competition. On the contrary, Lines, Inc. petitioned the court to keep competition alive and to declare—

a. Authority's right to license under the power to license (Mass. St. 1960, c. 701, § 5);

b. Authority's right to interfere with interstate commerce;

c. Authority's right to distend a license fee to a tax.

The court erred in denying Lines, Inc. due process on grounds of having accepted the so-called license. Here the fee is a discriminatory burden. It is fundamental that the power to license under the police power means a nominal fee applied to everyone. *Emery* v. *Lowell,* 127 Mass. 138. The fee must be based on fair and reasonable classifications and commensurate with just and reasonable charges to accomplish them.

The holder of a license can attack a provision of his license on the ground that it is not authorized by law. *Camp* v. *Rex Inc.,* 304 Mass. 484, 486.

In *Horton* v. *Attorney General,* 269 Mass. 503, at 510, the high court said: "If the rates are unjust or . . . discriminatory . . . no appropriate appeal to the courts is closed . . ."

Here the state court ignored an established precedent.

Article 10 of the Mass. Declaration of Rights reads: "Each individual . . . has a right to be protected . . . in the enjoyment of his life, liberty and property," etc.

The context here "forbid[s] the imposition upon one taxpayer of a burden relatively greater or relatively less than . . . upon other[s] . . ." *Bettigole* v. *Assessors of Springfield,* 343 Mass. 223, 230.

The power to tax rests in the General Court (Mass. Constitution, pt. II, c. 1, § 1, art. 4). It cannot be delegated to an Authority.

The court erred in stating that Lines, Inc. had not shown or offered to show harm. Obviously, the assessment of an amount in excess of $10,000 per year as a fee or tax to operate a boat is discrimination *per se,* and particularly when no other similar operation is assessed a dime.

In addition to this discrimination, the fee or excise of 7½ per cent of the gross income, affecting both local and interstate business, is an assessment on the entire business, and is unconstitutional and void. *International Paper Co.* v. *Commonwealth of Massachusetts,* 246 U.S. 135, 142.

It is a fundamental law, that, when a statute "by its necessary operation, be destructive of rights granted and secured by the U.S. Constitution . . . there is nothing for the court to do except to sustain the fundamental law by declaring the statute unconstitutional and void." *Mueller* v. *Commissioner of Public Health,* 307 Mass. 270, 275.

Here the unconstitutional provision of chapter 701, § 5, may be declared void without impairing any of the remaining provisions. (Mass. St. 1960, c. 701, § 18.)

Lines, Inc. has standing under the rule that one "whose rights are impaired by a statute can raise the question of its constitutionality . . . *as it applies to him.*" (Emphasis added.) *Hynson, Westcott & Dunning, Inc.,* v. *Commissioner of Public Health,* 346 Mass. 606, 610.

The case of *Commonwealth* v. *New England Transportation Co.,* 282 Mass. 429, 431-435, establishes the operation of Lines, Inc. to be interstate.

Denial of standing of Lines, Inc. discriminates against individual rights, fosters monopoly, denies due process and violates federal law.

Under the commerce clause of the United States Constitution "exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted." *International Paper Co.* v. *Commonwealth of Massachusetts,* 246 U.S. 135, 141-142.

Conclusion.

The above rights are "implicit in the concept of ordered liberty" (Justice Cardozo, in *Palko* v. *Connecticut,* 302 U.S. 319), and a writ of certiorari ought to issue to review the judgment of the Supreme Judicial Court of Massachusetts to protect these rights.

Respectfully submitted,

ROGER F. TURNER,
286 Central Avenue,
Milton, Massachusetts 02187.

Appendix.

Rescript Opinion of Supreme Judicial Court.

BARBARA C. FINE & another *vs.* WOODS HOLE, MARTHA'S VINEYARD AND NANTUCKET STEAMSHIP AUTHORITY & others. April 1, 1966. This is an appeal from a final decree dismissing the bill of Fine and Nantucket Express Lines, Inc. (Lines) seeking declaratory relief and to enjoin the Authority (St. 1960, c. 701), Massachusetts Bay Transportation Authority, and the State Commissioner of Administration from taking action in respect of a plan for acquiring and financing hydrofoil vessels to operate between Falmouth and the islands of Martha's Vineyard and Nantucket. Fine has shown no more than that she, an inhabitant of Massachusetts, is an owner of taxable property in Falmouth. She thus has established no interest apart from that of the public generally and has no standing to maintain this bill. See *Butler* v. *Selectmen of Wakefield,* 269 Mass. 585, 587; *Cabot* v. *Assessors of Boston,* 335 Mass. 53, 57; *Spear* v. *Boston,* 345 Mass. 744, 747.[a] Cf. *Woods* v. *Newton,* 349 Mass. , - . Lines shows and offers to show that it operates (sometimes as part of an interstate trip) a boat, the "Martha's Vineyard" under license from, and by arrangement with, the Authority and that the hydrofoils may compete with it. Apart from the license, Lines could not operate the "Martha's Vineyard" (see St. 1960, c. 701, § 5) and may not now question the validity of (a) the license which it accepted and to which it agreed, or (b) the statute which authorized the license, thus affording to Lines various benefits. See *Brown* v. *Nahant,* 213 Mass. 271, 275-276; *Commissioner of Banks* v. *Prudential Trust Co.* 242 Mass. 78, 88. See also *Opinion of the Justices,* 251 Mass.

[a] Mass. Adv. Sh. (1965) 989, 993-995.

569, 612; *Kaplan* v. *Bowker*, 333 Mass. 455, 459-460. Lines, in any event, has not shown or offered to prove that the license or the statute caused Lines any harm of a type for which judicial relief may be granted in this proceeding. In the circumstances, Lines, of course, has no standing to object merely because it will be subjected to competition. *Nantucket Boat Inc.* v. *Woods Hole, Martha's Vineyard & Nantucket S.S. Authy.* 345 Mass. 551, 553-554. Compare cases cited in the *Nantucket Boat Inc.* case where competitors may have special standing.

Final decree affirmed with costs of appeal to the defendants.

Roger F. Turner for the plaintiffs.

Laurence S. Fordham for Woods Hole, Martha's Vineyard & Nantucket Steamship Authority.